95-5661

Supreme Court, U.S.
FILED
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JUNE, 1996

JUAN MELENDEZ - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Juan Melendez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's denial of discretion to depart below the statutory mandatory minimum, upon the government's motion under U.S.S.G. §5K1.1, without a second government application under 18 U.S.C. §3553(e). Petitioner states that this Third Circuit ruling violates the Separation of Powers clause and the Due Process clause of the Fifth Amendment to the United States Constitution. This ruling furthers a split among the Circuit Courts on this issue which, given its constitutional dimensions,

requires the United States Supreme Court to resolve it.

QUESTIONS PRESENTED

1. Did the sentencing court have the discretion to depart below the applicable statutory minimum once the United States moved for departure under U.S.S.G. §5K1, without the requirement of a second government departure application under 18 U.S.C. 3553(e)?

OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States of America v. Juan Melendez, Appellant, Docket No. 93-5755 (3rd Cir. May 22, 1995), and appears in Appendix A to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on May 22, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

18 U.S.C. §3553(e)

21 U.S.C. §841

21 U.S.C. §846

28 U.S.C. §994(n)

STATEMENT OF THE CASE

The United States District Court, District of New Jersey, had jurisdiction pursuant to 18 U.S.C. §3231. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. §1291.

Petitioner, Juan Melendez, entered into a plea agreement with the government and pleaded guilty to conspiracy to distribute more than five kilograms of cocaine. The plea agreement contained a stipulation that the Sentencing Guideline level would be determined on the basis of more than 50 kilograms of cocaine. At sentencing, the government moved for a downward departure under §5K1.1 of the Guidelines in recognition of the petitioner's cooperation, but the government requested that the District Court not depart below the statutory minimum sentence of ten years' imprisonment. The Sentencing Court agreed that it did not have discretion to depart below the statutory minimum without a second government application under 18 U.S.C. 3553(e). The District Court then sentenced the petitioner to ten years. A Notice of Appeal was timely filed.

Petitioner argued on appeal that the sentencing court had the authority to depart below the minimum mandatory sentence, once the government had brought the departure application under U.S.S.G. §5K1.1. It was the government's continued position that 18 U.S.C. §3553(e) requires that the government bring a separate departure application before the sentencing court has

discretion to fashion a sentence below the applicable statutory minimum.

Oral argument was heard on this application. On May 22, 1995, the Third Circuit upheld the sentencing court's finding that it did not have authority to depart below the minimum mandatory sentence set by statute unless the government files a separate application under 18 U.S.C. §3553(e). This decision was based upon a literal reading of §3553(e), with the admonition that there is no specific statutory or guideline provision that specifically addresses this procedure.

A Petition for Rehearing and Suggestion for Rehearing En Banc was subsequently denied. Petitioner now seeks a Writ of Certiorari for review of this most important issue.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Certiorari should be granted for two reasons. Firstly, the issue raised upon appeal has caused a significant split among the Circuit Courts. The Second, Fifth, Seventh and Ninth Circuits have ruled in favor of petitioner's position that a second motion by the government is unnecessary under the statutory sentencing scheme. The Eighth Circuit, as well as the Third Circuit, have ruled otherwise.

Just as important, the Third Circuit's decision violates fundamental notions of due process and separation of powers.[1] The Due Process clause of the Fifth Amendment is violated by the deprivation of a neutral magistrate in deciding whether the defendant should be sentenced below the ten-year statutory minimum. The Separation of Powers clause is also violated by granting to the government unfettered discretion to deny a sentencing reduction where the defendant has given substantial assistance. In the process, the judicial function is absorbed into the powers enjoyed by the prosecution.

Given the Constitutional dimension of this issue, the United States Sentencing Commission lacks authority to address it. The only forum where it can properly be addressed is before the United States Supreme Court.

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[1] This issue was not raised before the Third Circuit, although it was addressed in a similar case before the Second Circuit in United States v. Cheng Ah-Kai, 951 F.2d 490 (2nd Cir. 1991).

I. THE SPLIT AMONG THE CIRCUIT COURTS REQUIRES THE UNITED STATES SUPREME COURT TO REVIEW THIS ISSUE.

There are two statutory provisions and one Guideline provisions which were misinterpreted by the panel majority in denying Melendez's appeal. Section 3553(e) grants to the Court the authority to impose a sentence below the applicable statutory minimum sentence "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 3553(e) refers to §994 which, in subsection (n), authorizes a sentence below the applicable statutory minimum where a defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense. Neither of these provisions indicate whether a separate application must be made by the government in order for the Court to sentence below the applicable minimum. The third provision, U.S.S.G. §5K1.1, provides for a departure from the applicable Guidelines where a defendant provides substantial assistance. Incorrectly, the Third Circuit read these provisions as requiring a separate government application for departure below the applicable statutory minimum.

Though the Third Circuit misread these provisions in Melendez, other Circuit Courts have not fallen into this literal translation trap. The Ninth Circuit examined in United States v. Keene, 933 F.2d 711 (9th Cir. 1991), the relationship between §3553(e) and §994 and U.S.S.G. §5K1.1. Though there is no legislative history nor anything in the language of the

applicable statutes that Congress intended to give the government the authority to set the parameters for exercising the Court's sentencing discretion once a §5K1.1 application was made, the Court analyzed the relationship between §3553(e), §994(n) and the applicable Guideline sections and concluded that §5K1.1 does not create a separate grounds for a motion for reduction, but rather, triggers the Court's authority to downward depart below any statutory minimum.

The Second Circuit in United States v. Cheng Ah-Kai, 951 F.2d 490 (2nd Cir. 1991), came to the same conclusion on this issue. In Ah-Kai, the defendant pled guilty to the importation of more than one kilogram of heroin in violation of 21 U.S.C. §952(A) and §960(b)(1)(A). Under the Sentencing Guidelines, he faced a sentencing range of between 151-188 months' incarceration. A ten-year mandatory minimum also applied.

Ah-Kai cooperated with the government. As part of a plea agreement, the government agreed to move for a downward departure from the Sentencing Guidelines, making no reference made to the statutory minimum ten-year sentence. In fact, the government specifically noted at sentencing that it was moving based upon U.S.S.G. §5K1.1 and not moving for any departure from the statutory minimum under §3553.

In its well-reasoned opinion, the Second Circuit obviated any distinction between these two statutes for sentencing purposes. The Court found §994(n) and U.S.S.G. §5K1.1 do not create a separate ground for a reduction motion below the

Guidelines, exclusive of §3553. Adopting the Keene rationale, the Second Circuit found that §5K1.1 implements the directive of both §994(n) and §3553(e) and that all three provisions should be read in concert to determine the appropriateness and extent of any departure. The Court further ruled that once the government had brought an application for departure under §5K1.1 based upon a defendant's cooperation, then it has discretion unfettered by any additional government application, to depart below the applicable statutory minimum.

The Ah-Kai Court relied upon several factors in entering into its decision, including: (1) Application Note 1 to U.S.S.G. §5K1.1 creating a conduit through which §3553(e) applies to all departure applications by the government related to a defendant's cooperation; (2) the requirement under both §5K1.1 and §3553(e) that a showing of substantial assistance be made before there can be a departure from the Sentencing Guidelines or from the statutory minimum; (3) the Sentencing Commission's reference to §5K1.1 government's departures below the statutory minimum and cases involving U.S.S.G. §2D1.1; (4) a proper distribution of the sentencing authority wherein the government is in the best position to initiate a departure application where substantial assistance has been rendered and the Court, exercising its discretion, is in the best position to decide departure.

The Fifth Circuit's ruling in United States v. Beckett, 996 F.2d 70 (5th Cir. 1993) mirrors the Keene and Ah-Kai decisions.

After dismissing the Eighth Circuit's ruling in United States v. Rodrigues-Morales, 958 F.2d 1441 (8th Cir. 1992), as simply a "literal reading" of the applicable statutory and Guideline provisions, the Beckett Court found the analysis of Ah-Kai and Keene more persuasive. At 74. The Court noted the substantial cross-referencing between §5K1.1, §3553(e) and §994(n) and concluded that their relationship made §5K1.1 the "appropriate vehicle" for the implementation of §3553(e). From a policy standpoint, it noted that the delicate balance between the government and the sentencing judge's authority is maintained under this analysis. Nor did it find any contrary provisions which limited the scope of the Court's sentencing authority once a §5K1.1 motion is filed.[2]

In the instant matter, the Third Circuit wrongly decided that the Court did not have authority to depart below the ten-year statutory minimum because the government did not expressly make a second application for departure. Petitioner submits that this interpretation of the applicable statutes is incorrect. The Supreme Court should grant certiorari since clarification of the District Court's authority under §5K1.1 is essential to heal the split among the Circuit Courts since, given the constitutional magnitude of this issue, the United States and Sentencing Commission are not in a position to resolve this most important issue.

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[2] The Seventh Circuit in United States v. Wills, 35 F.3d 1192 (7th Cir. 1992) has also concluded that a separate application is not necessary.

II. THE THIRD CIRCUIT'S DECISION VIOLATES DUE PROCESS AND ENCROACHES UPON JUDICIAL AUTHORITY.

Grave constitutional problems arise when the prosecutor is given the authority to sentence offenders or unilaterally to make Guideline decisions for their sentencing. Mistretta v. United States, 109 S.Ct. 647, 664 Note 17 (1989). The Court has recognized that at sentencing a defendant has a liberty interest in "avoiding future incarceration." United States v. Vizciano, 870 F.2d 52, 56 (2nd Cir. 1989). Thus, a defendant is entitled to procedural due process in sentencing. This requirement of due process limits Congress's authority to delegate to the prosecutor the job of finding the facts and making the judgment that the legislature deems relevant to sentencing.

In the instant matter, the prosecutor has recognized the defendant's "substantial assistance" by moving for a downward departure under §5K1.1. Yet, despite this recognition, the Court of Appeals has found that the Court lacks the power to depart below the statutory minimum unless the prosecutor makes a separate motion under §3553(e). As a result, the prosecutor, rather than the judge, has the real discretion of deciding the scope of sentencing under a substantial assistance motion. Granting the prosecutor this broad power violates the Due Process clause as well as the Separate of Powers clause of the United States Constitution.

The process due a criminal defendant includes, except in narrowly limited situations, evaluation of sentencing factors by a neutral and independent judge rather than by the accusing

officer. The reasons for this are deeply rooted in our system of government and in the Constitution. As the Supreme Court has written in another context, "prosecutors...simply cannot be asked to maintain the requisite neutrality with regard to their own investigations--the 'competitive enterprise' that must rightly engage their single-minded attention." Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971). The Court has thus held that those who perform prosecutorial functions cannot, in the very same case, be assigned judicial functions. Id. at 450-51 (prosecutor cannot perform magistrate's function of issuing search warrant); In re Murchison, 349 U.S. 133, 134, 137-39 (1955) (trial of case by judge who sat as sole grand juror, a prosecutorial function, violated due process; deprivation of "impartial tribunal"). Just as an officer who "was part of the accusatory process...'cannot be, in the very nature of things, wholly disinterested in the conviction and acquittal of those accused,'" Mayberry v. Pennsylvania, 400 U.S. 455, 505 (1971), citing In re Murchison, 349 U.S. at 137, he cannot be wholly disinterested in the question of sentence. And a defendant is, without doubt, entitled to be sentenced by an impartial and disinterested magistrate. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968). Allowing the prosecutor (rather than a judge) the complete discretion to decide the scope of a "substantial assistance" motion, once it has been made, deprives the sentencing proceeding of "the appearance of evenhanded justice which is at the core of due process." Mayberry v. Pennsylvania,

400 U.S. at 469 (Harlan, J., concurring).

If §5K1.1 is constitutional at all, a matter about which serious doubts have recently been expressed, it is primarily for two reasons: the sentencing power given the prosecution is the narrow one of determining whether there has been substantial assistance, and the question of whether there has been substantial assistance is one that the prosecution is uniquely suited to answer. It is on these bases that virtually every Circuit to have considered the question has upheld the constitutionality of §5K1.1.

Once a prosecutor has formally made a motion to the court certifying that he has found "substantial assistance" on the part of a defendant, however, these rationales disappear. The prosecutor has at that point carried out the "narrow" function assigned him under the Guidelines. He has, moreover, certified to the court the result of his performance of the function he is uniquely suited to serve by indicating that "substantial assistance" was in fact given by the defendant. The grant of further authority to the prosecutor to limit the trial court's discretion in acting on the prosecutor's own conclusion is essentially irrational and constitutes a raw shift of power from the judicial to the executive. This unbridled power to limit sentencing options is conferred not on a neutral magistrate, but on the very person who investigated the case, initiated charges, and prosecuted the trial.

It is highly significant in this respect that once a

defendant's "substantial assistance" has been certified to the court, any further power of the prosecutor to circumscribe the court's discretion lacks any standard for its exercise. Under §5K1.1, the function of the prosecutor is to determine whether or not there is substantial assistance, and the meaning of this phrase is fairly clear and subject to more or less uniform application. Once the existence of this assistance has been ascertained, however, there are no standards, statutory or otherwise, to guide the prosecutor's discretion in deciding whether to recommend a departure below the statutory minimum as well as a departure below the guidelines. It is no longer the prosecutor's job to evaluate the quality or ultimate effect of the assistance. At this point, therefore, the government may make its decision to deny a further sentence reduction on any factor it chooses. This broad, unreviewable, and standardless discretion to affect a sentence, and to deprive the sentencing court of the ability to consider facts before it, violates the Due Process Clause of the Fifth Amendment.

For essentially these same reasons, the government's construction of these provisions would violate the Separation of Powers clause. It would constitute a clear encroachment on judicial authority, for it would remove from the district court the power to grant some relief under a substantial assistance motion.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued to review the judgment and opinion of the Third Circuit Court of Appeals in this matter.

Respectfully submitted,

Dated: August 11, 1995

Patrick A. Mullin
Attorney for Petitioner
Juan Melendez

Filed May 22, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ
Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. Action No. 92-cr-00713-2)

Argued February 16, 1995

BEFORE: STAPLETON and COWEN, *Circuit Judges*, and HUYETT, *District Judge**

(Opinion Filed May 22, 1995)

Patrick A. Mullin (Argued)
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*Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

EXHIBIT A

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Victor Ashrafi (Argued)
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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Juan Melendez appeals his sentence. The first issue presented concerns a district court's authority to depart downward from a statutory minimum sentence based upon the defendant's substantial assistance with a criminal investigation where the government has moved under USSG §5K1.1 for a departure below the U.S. Sentencing Guideline range but has not moved under 18 U.S.C. § 3553(e) for a departure below the statutory minimum. We hold that, under such circumstances, a district court's authority under §5K1.1 to depart below the Sentencing Guideline range does not permit it to depart below a lower minimum sentence set by statute. The second issue concerns Melendez's motion for a downward departure pursuant to application note 17 to USSG §2D1.1. We agree with the district court that §2D1.1 application note 17 does not permit a district court to depart downward from a statutory minimum sentence. The final issue concerns Melendez's contention that the district court should have permitted him to withdraw his guilty plea. The record establishes that Melendez in fact did not attempt to withdraw his plea before the district court.

I.

Melendez and codefendant Edwin Moya were approached by confidential informants of the United States Customs Service posing as importers and transporters of cocaine. This initial contact led to several meetings, during which Melendez, Moya, and the confidential informants discussed

the availability of cocaine for distribution. The discussions culminated in a meeting during which Melendez and Moya gave the confidential informants $10,000 as a deposit toward the transportation expenses for 24 kilograms of cocaine. The next day, the two codefendants deposited an additional $2500 for the transportation of the cocaine.

Shortly thereafter, Moya and Melendez were arrested by New York authorities on unrelated drug charges. After their arrest, Moya's common law wife, Anna Maria Ferrara, her brother Raphael Ferrara, and her uncle Bienvenido Polanco, held further negotiations with the confidential informants for a 225-kilogram cocaine purchase. Government agents ultimately made a controlled delivery of 30 kilograms of cocaine to Raphael Ferrara and Polanco. Raphael Ferrara and Polanco were arrested shortly after taking possession of the drugs and Anna Maria Ferrara was arrested on the following day.

Melendez was charged with conspiring, in violation of 21 U.S.C. § 846, to distribute and to possess with intent to distribute more than five kilograms of cocaine, a crime that carries a statutory minimum sentence of 10 years' imprisonment. 21 U.S.C. § 841(b)(1)(A). He originally pleaded not guilty. Plea negotiations ensued, however, and Melendez ultimately signed a cooperating plea agreement. The agreement provided, in pertinent part, that in return for Melendez's cooperation with the government's investigation and his pleading guilty, the government would move for a downward departure from the applicable Guideline range pursuant to USSG §5K1.1. The agreement did not require the government to file a § 3553(e) motion to depart below the statutory minimum, however. Melendez retracted his plea of not guilty and pleaded guilty to the charged conspiracy.

The probation officer determined that the Guideline sentencing range applicable to Melendez's crime was 135 to 168 months. The government, in accordance with the agreement, moved for a downward departure from that Guideline range, pursuant to §5K1.1, in recognition of Melendez's substantial assistance in the investigation or prosecution of another person. The district judge granted that motion, and departed downward from the sentencing

range set by the Guidelines. However, because the government had not also moved pursuant to § 3553(e), the judge ruled that he had no authority to depart below the statutory minimum and meted out the 10-year minimum sentence required by statute. Melendez maintains that this was error. He argues that a §5K1.1 motion not only triggers the court's authority to depart downward from the sentencing level set by the Guidelines but also triggers the court's authority to depart below a lower, statutory minimum.

II.

The government maintains that Melendez waived or forfeited his right to appeal this issue, claiming that Melendez never formally argued to the district court that the government's §5K1.1 departure motion empowered the court to depart below the 10-year statutory minimum. To preserve the right to appeal a district court ruling, "it is sufficient that a party, at the time the ruling . . . is made or sought, makes known to the court the action which that party desires the court to take . . . and the grounds therefor." Fed. R. Crim. P. 51. Moreover, "[t]he general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance." 3A Charles A. Wright, *Federal Practice & Procedure* § 842, 289-90 (1982 & Supp. 1994); *see also Government of Virgin Islands v. Joseph*, 964 F.2d 1380, 1384-85 (3d Cir. 1992) (rejecting the government's contention that an issue was not preserved for appeal because the court had been made aware of the issue and because a contemporaneous objection would not have further aided the district court); *cf. United States v. 57.09 Acres of Land*, 757 F.2d 1025, 1027 (9th Cir. 1985) (noting that the government did not waive its right to object to jury instructions because the court had been made "aware of the government's objection"); *Bass v. Department of Agriculture*, 737 F.2d 1408, 1413 (5th Cir. 1984) (noting the established rule in civil cases "that formal objection is not

necessary if the trial judge was fairly apprised of the nature of the objection").

Our review of the record reveals that Melendez in fact "[made] known to the court the action which [he] desire[d] the court to take." As the Assistant United States Attorney admitted during the sentencing hearing: "Both defendants through counsel have argued that the Court depart downward from this mandatory minimum." (App. at 24a.) Moreover, the district court was made well aware of the underlying legal debate over whether a §5K1.1 motion permits a district court to depart below a statutory minimum. The government admitted during the sentencing hearing that "[s]ome arguments indicate that the law doesn't require the Court to impose the mandatory minimum." (App. at 24a.) Most importantly, the district court clearly understood that Melendez was asserting these arguments; it expressly addressed and resolved the issue of the court's authority to depart below the statutory minimum. In this context, there was no need for Melendez to take the additional step of repackaging the government's statement as his own formal objection to preserve his right to appeal. Any such requirement would elevate form over substance. Thus, we conclude that this issue is properly preserved for appeal and we will proceed to the merits of Melendez's argument.

III.

Congress has decreed that a person who distributes, or conspires to distribute, five kilograms or more of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years." 21 U.S.C. §841(b)(1)(A). This statute represents a Congressional judgment about the seriousness of this offense and the degree of sanction necessary to punish and deter this kind of conduct.

At the same time, Congress has recognized that the value to society of the cooperation of an individual charged with this kind of offense can, under some circumstances, outweigh the benefit to be derived from imposing the statutory minimum sentence. Accordingly, Congress has authorized sentences below this and other statutory minima. Section 3553(e) of Title 18 provides:

> **(e) Limited authority to impose a sentence below a statutory minimum. — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.**

Notably, Congress has authorized sentences below a statutory minimum only upon a prosecution's motion; that is, before a court may depart below a statutory minimum, the prosecutor first must determine that the value of the cooperation is sufficiently great to warrant overriding Congress's judgment concerning the minimum appropriate sentence. By requiring a government motion, Congress thus gave the prosecutor the sole key that affords access to a sentence below a statutory minimum. *Wade v. United States*, 112 S. Ct. 1840, 1843 (1992).

That the prosecutor holds the sole key to the area below the statutory minimum does not mean that the sentencing court, once the prosecutor has made a §3553(e) motion, has unbridled discretion to set a defendant's sentence, however. As the final sentence of §3553(e) reflects, Congress contemplated that the limited downward departure authority there bestowed on a sentencing court would be exercised in the context of, and in a manner consistent with, a system of Guidelines sentencing that was being constructed at the time of the passage of §3553(e). Consistent with this approach, section 994(n) of Title 28 of the Sentencing Reform Act of 1984 directs the Sentencing Commission to formulate Guidelines that will reflect the general appropriateness of rewarding cooperation with sentences lower than they would otherwise be, including sentences below a statutory minimum. Section 994(n) of Title 28 provides in pertinent part:

> The [Sentencing] Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be

> imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Although § 994(n) directs recognition of the principle that a lower sentence for cooperation can be appropriate, it says nothing about a process for identifying particular cases in which such a sentence may be appropriate. Accordingly, nothing in the text of § 994(n) suggests that Congress intended by the passage of § 994(n) to take back the access key given to the prosecutor in § 3553(e). The same can be said for the legislative history of § 994(n). The most one can argue, from Melendez's perspective, is that § 994(n) *may authorize the Commission* to take back that key. The text of § 994(n) does not seem to us to require that reading, however, and the legislative history provides no evidence of such an intent on the part of Congress.

Under § 994(n), the principle that a lower sentence for cooperation may be appropriate applies as well to sentences established by the Guidelines. Here also § 994(n) says nothing about how particular cases appropriate for such sentences will be identified. Thus, nothing in § 994(n) requires the Commission to give the prosecutor an exclusive access key to sentences *below the Guideline range* in return for cooperation.

The Commission exercised the authority given to it in this area by promulgating USSG §5K1.1. That Guideline and its first application note provide in relevant part:

> **§5K1.1. *Substantial Assistance to Authorities (Policy Statement)***
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> * * * *

> *Application Notes:*
>
> 1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

There are two things about this action of the Commission that seem to us important in the current context. The first is that the sole authority granted in §5K1.1 is for departures "from the guidelines." Given the express reference in the application note to statutes authorizing departures "below a statutorily required minimum sentence," we believe this limitation must represent an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e).[1]

Second, §5K1.1 reflects a policy decision *on the part of the Commission* to give the prosecutor a veto power over departures below the Guideline range based on cooperation. The Commission thus recognized the value of letting the prosecutor's discretion control access to the area between the applicable Guideline range and any applicable, lower statutory minimum, just as § 3553(e) allows that discretion to control access to the area below a statutory minimum.

With this background, we turn to Melendez's argument. He must first ask us to conclude that Congress in § 944(n) authorized the Commission to take back the access key granted to the prosecutor in § 3553(e). While we question this proposition, we may accept it *arguendo* here. Melendez next insists that the Commission, while recognizing the value of allowing the prosecutor to control access to departures for cooperation below the Guideline range,

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1. Where a statutory minimum is above the Guideline range, it becomes "the guideline sentence." USSG §5G1.1(b). We do not suggest that two motions are required in such circumstances. A motion under either § 3553(e) or §5K1.1 will suffice to demonstrate that the requisite exercise of prosecutorial discretion has occurred.

created a system under which he or she can grant access to the area between the Guideline range and a lower statutory minimum only by surrendering his or her access control to the area below the statutory minimum. Melendez tenders no persuasive reason, however, why the Commission might have chosen to create such a seemingly incongruent system.

The root issue for decision here is whether the prosecutor in a given case will be able to grant access to a Guideline departure for cooperation and at the same time retain control of access to a departure from a lower, statutory minimum. A literal reading of §5K1.1 would indicate that a prosecutor has this option. This conclusion is consistent as well with the Congressional judgment reflected in § 3553(e). Moreover, no policy considerations appear to counsel against this conclusion and a number counsel in favor. Indeed, beyond this case, a denial of this option for the prosecution would appear to be in no one's best interest. As Judge Easterbrook observed in his dissent in *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994):

> Section 3553(e) and Guideline 5K1.1 permit a prosecutor to offer a reward for assistance. This process works best if the amount of the reward can be graduated to the value of the assistance — a value the prosecutor (who sees the full menu of crimes and potential cases in the district) can assess better than a judge. . . . [H]olding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate [will curtail] the prosecutor's ability to match the reward to the assistance. When cooperation can be procured for a modest reduction, a lower sentence overcompensates the defendant, at the expense of the deterrence force of the criminal law. Another consequence is that there will be fewer motions of any kind. If filing a motion under § 5K1.1 permits the judge to cut the sentence by three-quarters (as happened here), the prosecutor will insist on a great deal of assistance. Many defendants are unlucky enough to have little of value to offer. . . . They are now condemned to serve the full authorized sentence, even though a prosecutor possessed of power to differentiate might reward slight aid with a slight reduction.

We hold that a motion under USSG §5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum.[2]

IV.

Melendez next argues that the government's confidential informants offered to sell him cocaine at prices substantially below market price, thereby leading him to purchase a significantly greater quantity of cocaine than he ordinarily would have been able to purchase given his available funds. He maintains further that the $12,500 he had available for the drug deal would have enabled him to purchase, on the open market, only between one-half and three-quarters of a kilogram of cocaine instead of the more than 50 kilograms attributed to him by the district court. These facts, he contends, mandate a downward departure under Application Note 17 to USSG §2D1.1.[3]

Melendez is not in a position to make these arguments, however. In his plea agreement, he specifically stipulated

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2. In so concluding, we join the Court of Appeals for the Eighth Circuit. *United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir. 1992). We respectfully disagree with the other courts of appeals that have addressed the same issue. *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). We note our accord with the thoughtful dissents in *Wills* and *Keene*.

3. Application Note 17 states:

> If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

that his applicable Guideline range was 50 kilograms to 150 kilograms of cocaine. Moreover, the probation report determined that the applicable quantity of cocaine to be 75 kilograms and neither Melendez's objections to the presentence report nor his sentencing letter to the district court requested that less than five kilograms should be attributed to him. We accordingly conclude that the district court properly attributed more than five kilograms of cocaine to Melendez.

Having determined that the district court properly attributed in excess of five kilograms of cocaine to Melendez, the district court then was constrained to impose the statutory minimum sentence of 10 years' imprisonment. *See, e.g., United States v. DeMaio*, 28 F.3d 588, 591 (7th Cir. 1994) (holding that a sentencing court may not depart below a statutory minimum on any ground other than substantial assistance to criminal investigation); *United States v. Rudolph*, 970 F.2d 467, 470 (8th Cir. 1992) (holding that defendant's diminished capacity, while grounds for departure from the Guidelines sentencing range, is not grounds for departure below the minimum sentence set by Congress), *cert. denied*, 113 S. Ct. 1023 (1993); *United States v. Valente*, 961 F.2d 133, 135 (9th Cir. 1992) (holding that defendant's aberrant behavior will not justify a departure below a statutory minimum).

V.

Finally, Melendez argues that the district court should have given him an opportunity to withdraw his guilty plea once he learned that the government did not intend to recommend a sentence below the 10-year statutory minimum. This issue also was not properly preserved for appeal. Although Melendez, in a brief filed *pro se*, maintains that he expressed his desire to withdraw his plea both in conversations with his attorney and in a letter to the court, nothing in the docket sheet or the record before this court supports those claims. Moreover, Melendez failed to express his alleged desire to withdraw his plea when he addressed the court at his sentencing. Because Melendez failed to raise this issue before the district court, we cannot address it here. *See, e.g., United States v. Johnson*, 359

F.2d 845, 846 (3d Cir. 1966) (noting that questions cannot be presented on appeal that have not first been determined by the district court).

VI.

We will affirm the judgment of the district court.

HUYETT, District Judge, dissenting:

I join in Parts I, II, and V of the majority opinion, and respectfully dissent with respect to Parts III, IV, and VI. Although the issue is a close one, I believe the majority has erred in holding that when a sentencing court grants a USSG § 5K1.1 motion to depart below the guideline sentence, the court may not impose a sentence below the statutory minimum unless the § 5K1.1 motion is accompanied by a motion under 18 U.S.C. § 3553(e). I believe the court should follow the position accepted in the majority of circuits that have considered this issue. *See United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). *But see United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 375, 121 L. Ed.2d 287 (1992).

The majority correctly reasons that 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) are silent with respect to whether the prosecutor should be given exclusive access to sentences below the Guideline ranges. I believe the majority errs, however, in determining that § 5K1.1 reflects the Sentencing Commission's advertent decision to give the prosecutor a veto over departures below the Guideline ranges and to leave departures below the statutory minima to the authority conferred by § 3553(e).

A careful reading of the sentencing guidelines and its commentary leads to an opposite conclusion. Guideline commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, ___ U.S. ___, ___, 113 S. Ct. 1913, 1915, 123 L. Ed.2d 598 (1993). With this direction in mind, I believe the court should give more careful consideration to the commentary to the guidelines.

Section 5K1.1 must be read together with application note 1 which reads:

> Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

USSG § 5K1.1 comment. (n.1). I believe this note expresses the Sentencing Commission's intent that § 5K1.1 serve as a "conduit" for the application of § 3553(e), *see Cheng Ah-Kai*, 951 F.2d at 493, and not an attempt to create two separate motions concerning substantial assistance. Application Note 7 to USSG § 2D1.1, the guideline concerning drug offenses, further supports this interpretation and reads as follows:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* § 5K1.1 (Substantial Assistance to Authorities).

USSG § 2D1.1 comment. (n.7). The reference to § 5K1.1 rather than to § 3553(e) illustrates the Commission's determination that departures from the statutory minimum sentence are a mere subset of departures from the guidelines. This cross referencing, along with the substantial cross referencing between § 5K1.1, § 3553(e), and § 994(n) supports the conclusion that the district court has discretion. *See Keene*, 933 F.2d at 714.

I also disagree with the majority's view that "no policy considerations appear to counsel against this conclusion and a number counsel in favor" of its conclusion. Majority Op. at 9. Other circuits have ably raised policy considerations that counsel against the majority's position. The Ninth Circuit, for example, reasoned that with regard to the powers conferred on the government by § 5K1.1 and § 3553(e), "[o]nce the motion is made by the government, a transfer of discretion regarding the range of departure

could well frustrate Congress' goal of eliminating sentencing disparity given the absence of appellate review over the prosecutor's activity." *Keene*, 933 F.2d at 715. In addition, an interpretation that provides two separate and distinct types of departure "would lead to a usurpation of the discretion of the district court." *Cheng Ah-Kai*, 951 F.2d at 494.

Although permitting the judge to depart below the guidelines or the statutory minimum on the basis of a § 3553(e) or § 5K1.1 motion curtails the prosecutor's ability to match the reward to the assistance, the defendant's sentence will still reflect his cooperation. Judges are quite capable of making this determination and should be permitted to exercise their sound discretion. *See id.*; *Keene*, 933 F.2d at 714.

I would vacate the sentence imposed by the district court and remand this case for resentencing. Therefore, I dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit